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No. 06-1704

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DARCE CARLISLE,

Petitioner,

v.

CARNIVAL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Whether this Court should review the Florida Supreme Court's decision that Florida's Third District Court of Appeal had no authority to reject settled maritime law that shipowners are not vicariously liable for the negligence of shipboard doctors in treating passengers where the Florida Supreme Court's decision does not conflict with a decision of this Court, a federal court of appeals, or another state court of last resort, and the decision does not implicate an important, unsettled federal question.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Carnival Corporation states that it does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

In August 2003, Florida's Third District Court of Appeal reversed a summary judgment for our client, Carnival Corporation, and held that a shipowner is vicariously liable for the negligence of a shipboard doctor in treating passengers. In doing so, the Third District expressly rejected the established federal maritime rule that shipowners are not vicariously liable for the negligence of shipboard physicians, commonly called the *Barbetta* rule after the Fifth Circuit's decision in *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988), and adopted instead the reasoning of a solitary federal district court case, *Nietes v. American President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959). *Carlisle v. Carnival Corp.*, 864 So. 2d 1, 7 (Fla. 3d DCA 2003). On Carnival's motion, the Third District certified to the Florida Supreme Court as a matter of great public importance the question of "whether a cruise line is vicariously liable for the medical malpractice of the shipboard doctor, committed on a ship's passenger." 864 So. 2d at 8.

In February 2007, the Florida Supreme Court answered the question in the negative, concluding that Florida's Third District Court of Appeal ("Third District") erred when it departed from clearly established and well-settled maritime law in imposing vicarious liability on Carnival. *Carnival Corp. v. Carlisle,* 953 So. 2d 461, 463, 470-71 (Fla. 2007).

The petitioner, Darce Carlisle ("Carlisle") has presented no "compelling reasons" for this Court to grant her petition for a writ of certiorari seeking review of the

Florida Supreme Court's opinion. *See* Sup. Ct. R. 10.[1] Specifically, Carlisle has failed to demonstrate that the Florida Supreme Court decided an important federal question that conflicts with a decision of this Court, another state court of last resort, or a United States court of appeals, or decided an important federal question that is unsettled by this Court. *See* Sup. Ct. R. 10(b), (c). Therefore, Carlisle's petition should be denied.

STATEMENT OF THE CASE

We refer the Court to the factual and procedural history set forth in the Florida Supreme Court's opinion, *Carnival Corp. v. Carlisle,* 953 So. 2d 461, 463 (Fla. 2007) (App. A).[2]

[1] Rule 10 of the United States Supreme Court Rules, "Considerations Governing Review of Certiorari," provides that a petition for writ of certiorari will be granted "only for compelling reasons." Sup. Ct. R. 10. Rule 10 "indicate[s] the character of the reasons" that this Court will consider in granting or denying petitions for certiorari. Among these considerations is whether there is a conflict between the decisions of two federal courts of appeals, a court of appeals and the highest court of a state, or two state courts of last resort. Additionally, the Court considers whether a state court or federal court of appeals has decided an important question of federal law that should be settled by this Court, or decided a federal question in a way that conflicts with applicable decisions of this Court. Sup. Ct. R. 10(b), (c).

[2] We refer to the decisions of the Florida Supreme Court and the Third District Court of Appeal in this case, which are appended to the petition for writ of certiorari, by decision page numbers and appendix page numbers. The petitioner, Darce Carlisle, brought this action on behalf of her minor daughter, Elizabeth, and we refer to Darce as "Carlisle." Carlisle's petition for writ of certiorari is "Petition."

REASONS FOR DENYING THE PETITION

To invoke this Court's certiorari jurisdiction, Carlisle claims that there is a "conflict" or "split of authority" between "federal and state courts applying general maritime law" on the question of whether a shipowner may be held vicariously liable for the negligence of a shipboard physician (Petition at 4, 7). In the alternative, she asserts that this case presents an important question of federal maritime law affecting "cruise line passengers nationwide" (Petition at 15). On the merits, Carlisle posits that the *Barbetta* rule is antiquated and should be "overrule[d]" by this Court (Petition at 8).

As we will show, however, this Court should deny Carlisle's petition because this case does not present a conflict of authority or an important question of federal law requiring this Court's resolution. First, the Florida Supreme Court's decision quashing the Third District's underlying opinion does not conflict with a decision of this Court, a federal court of appeals, or another state court of last resort. The Florida Supreme Court merely held, squarely in accord with precedent of this Court, that the Third District had no authority to deviate from settled federal maritime law and violate the long-standing principle of uniformity. Apart from answering the certified question in the negative, the Florida Supreme Court did not even address the substantive question of a shipowner's vicarious liability for the medical negligence of a shipboard physician. Thus, its decision cannot be said to "conflict" with any precedent of this Court or of any other court on this issue. And even if it could be said that the Florida Supreme Court touched on the merits by answering the certified question in the negative, the notion that there is

any conflict here is quickly belied by a brief analysis of the purportedly conflicting decisions.

In addition, the Florida Supreme Court did not "decide" an important issue of federal law that is unsettled by this Court. Again, the decision merely stands for the unremarkable proposition that a state court – like the Third District in this case – cannot depart from uniform federal maritime law.

Finally, the Florida Supreme Court reached the right decision below because the Third District had no authority to deviate from the settled *Barbetta* rule on the vicarious liability of shipowners for the negligence of shipboard physicians, and the *Barbetta* rule is correct.

For all of these reasons, the petition should be denied.

I. The Florida Supreme Court's Opinion Does Not Create a Conflict of Authority

As the primary basis for attempting to invoke this Court's certiorari jurisdiction, Carlisle asserts that the Florida Supreme Court's decision in this case "raises an issue of federal maritime law over which federal and state courts applying general maritime law are squarely divided" (Petition at 4). According to Carlisle, although a "majority of courts" have elected to follow the *Barbetta* rule, "[a] growing number of courts" have rejected *Barbetta*, and "[t]his Court is the only judicial body capable of resolving the split of authority on this issue." (Petition at

6, 7).[3] As we will show, however, Carlisle's conflict theory is pure sophistry.

A. The Florida Supreme Court's Decision That the Third District Had No Authority to Change Settled Federal Maritime Law Does Not Conflict With Any Other Decisions

The Florida Supreme Court's opinion does not conflict with any decision of this Court, a United States court of appeals, or another state court of last resort. Carlisle tells this Court that the decision implicates an important federal maritime question over which the courts are "squarely divided" – the issue of a shipowners' vicarious liability for the medical negligence of a shipboard doctor (Petition at 4). But, as the Florida Supreme Court astutely recognized, the issue before it was actually quite different than the one Carlisle proposes:

> This Court must determine whether the Third District Court of Appeal could follow the holding in *Nietes v. American President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959), or whether the Third District was bound to follow the other

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[3] Although Carlisle posits that there are "four different views" on this legal issue, there are only two possible "views" on this matter – the "majority of courts" following the *Barbetta* rule and the so-called "growing number of courts" rejecting it (Petition at 6). The third "view" Carlisle discusses – courts following *Barbetta* with "reservations" – certainly falls within the majority category. And the last "view" Carlisle describes – courts declining to overrule *Barbetta* but holding that a cruise line can be liable for a shipboard physician's negligence on another legal theory – likewise falls within the ambit of the majority of courts following *Barbetta*.

> precedent as outlined in *Barbetta v. S/S Bermuda Star,* 848 F.2d 1364 (5th Cir. 1988).
>
> . . .
>
> *The question thus becomes whether the Third District was bound to follow the rule of law on this issue as espoused by the majority of such cases.* In other words, the questions that must be answered are whether there is a uniform federal position on the issue and whether application of the *Nietes* rule would violate the rule of uniformity.

953 So. 2d at 464-65 (emphasis added) (App. A at 5a, 6a). Thus, the Florida Supreme Court acknowledged that, instead of directly ruling on the vicarious liability issue, it had to examine whether Florida's Third District was required to follow the settled maritime rule of *Barbetta* or had the authority to discard it.

After thoroughly analyzing the body of case law addressing this issue dating back to 1887, the Florida Supreme Court agreed with Carnival that, with the exception of *Nietes,* the federal maritime law has been uniform that a shipowner is not vicariously liable for the medical negligence of the shipboard physician. 953 So. 2d at 470 (App. A at 18a). And consistent with well-settled precedent of this Court, the Florida Supreme Court correctly held that a state court could not interfere with the uniformity of maritime law by changing a long-settled maritime rule. 953 So. 2d at 465, 470 (App. A at 7a-8a, 18a). *See also American Dredging Co. v. Miller,* 510 U.S. 443, 447 (1994) (state court may "'adopt such remedies, and . . . attach to them such incidents, as it sees fit' *so long as it does not attempt to make changes in the 'substantive maritime law'*") (emphasis added), quoting *Madruga v.*

Superior Court, 346 U.S. 556, 561 (1954), quoting *Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109, 124 (1924). *Accord Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 222 (1986). Thus, because the Third District violated the prohibition against a state's changing substantive maritime law by rejecting the universally applied *Barbetta* rule in favor of the never-before-followed *Nietes,* the Florida Supreme Court quashed the Third District's decision. 953 So. 2d at 465, 470-71 (App. A at 7a-8a, 18a-19a).

Accordingly, contrary to Carlisle's claim of conflict, the Florida Supreme Court's decision does not involve "a question of federal maritime law over which courts are presently divided" (Petition at 2). Instead, it reaffirms principles of uniformity that have governed maritime law for more than a century. The decision does not even address the merits of the vicarious liability issue apart from stating in *dicta* that "[t]he position espoused by the Third District has some appeal." 953 So. 2d at 470 (App. A at 17a). Because the Florida Supreme Court never directly addressed the substantive issue of a shipowner's vicarious liability, its decision certainly does not create a conflict on this issue warranting certiorari review. The petition should be denied.

B. The *Barbetta* Rule Is Settled Maritime Law

Even if it could be said that the Florida Supreme Court touched on the substantive issue of a shipowner's vicarious liability by answering the certified question in the negative, there is no conflict of authority for this Court to resolve. For well over a century, the maritime law has been that a shipowner is not vicariously liable for the negligence of a ship's physician in treating passengers. "If

the doctor is negligent in treating a passenger ... that negligence will not be imputed to the carrier." *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988). It is beyond question that the rule articulated in *Barbetta* is settled maritime law. In at least thirty-two decisions over more than a hundred years, courts have adhered to it, including five from federal circuit courts of appeals, twenty-three from federal district courts, two from New York's highest court, one from Massachusetts' highest court, and one from a California intermediate appellate court. *See Cummiskey v. Chandris, S.A.*, 895 F.2d 107, 108 (2d Cir. 1990); *Barbetta*, 848 F.2d at 1369; *Metzger v. Italian Line,* 1976 A.M.C. 453, 455 (S.D.N.Y.), *affirmed*, 535 F.2d 1242 (2d Cir. 1975); *The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918); *The Great Northern*, 251 F. 826, 831-32 (9th Cir. 1918); *Barnett v. Carnival Corp.,* No. 06-22521-CIV, 2007 WL 1746900, at **3-4 (S.D. Fla. June 15, 2007); *Barnett v. Carnival Corp.,* No. 06-22521-CIV, 2007 WL 1526658, at **3-4 (S.D. Fla. May 23, 2007); *Walsh v. NCL (Bahamas) Ltd.,* 466 F. Supp. 2d 1271, 1273-74 (S.D. Fla. 2006); *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1370-71 (S.D. Fla. 2005); *Bykowski v. Holland America Line-Westours, Inc.,* No. C04-318Z, 2005 WL 2135144, at *2 (W.D. Wash. Aug. 31, 2005) (unpublished); *Jackson v. Carnival Cruise Lines, Inc.*, 203 F. Supp. 2d 1367, 1374 (S.D. Fla. 2002); *Doe v. Celebrity Cruises*, 145 F. Supp. 2d 1337, 1345-46 (S.D. Fla. 2001); *Lee v. Regal Cruises, Ltd.*, 916 F. Supp. 300, 303 n.3 (S.D.N.Y. 1996), *affirmed*, 116 F.3d 465 (2d Cir. 1997); *Malmed v. Cunard Line Ltd.*, No. 91 Civ. 8164 (KMW), 1995 WL 505915, at **1-3 (S.D.N.Y. Aug. 23, 1995) (unpublished); *Warren v. Ajax Navigation Corp.*, No. 91-0230-CIV-RYSKAMP, 1995 WL 688421, at *3 (S.D. Fla. Feb. 3, 1995) (unpublished); *Fairley v. Royal Cruise Line Ltd.*, 1993 A.M.C. 1633, 1634-35, 1639 (S.D. Fla. 1993); *Gillmor v. Caribbean*

Cruise Line, Ltd., 789 F. Supp. 488, 491-92 (D.P.R. 1992); *Hilliard v. Kloster Cruise, Ltd.*, 1991 A.M.C. 314, 316-17 (E.D. Va. 1990); *Nanz v. Costa Cruises, Inc.*, 1991 A.M.C. 48, 49 (S.D. Fla. 1990), *affirmed*, 932 F.2d 977 (11th Cir. 1991); *Mascolo v. Costa Crociere, S.p.A.*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989); *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 103-04 (E.D. Penn. 1982); *Cimini v. Italia Crociere Int'l S.P.A.*, 1981 A.M.C. 2674, 2677 (S.D.N.Y. 1981); *Bowns v. Royal Viking Lines, Inc.*, 1977 A.M.C. 2159, 2162-63 (S.D.N.Y. 1977); *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042-43 (S.D.N.Y. 1969); *Ludena v. The Santa Luisa*, 112 F. Supp. 401, 408 (S.D.N.Y. 1953); *Branch v. Compagnie Generale Transatlantique*, 11 F. Supp. 832, 832 (S.D.N.Y. 1935); *Churchill v. United Fruit Co.*, 294 F. 400, 401-02 (D. Mass. 1923); *The Napolitan Prince*, 134 F. 159, 160 (E.D.N.Y. 1904); *Allan v. State S.S. Co.*, 30 N.E. 482, 485 (N.Y. 1892); *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 267 (Mass. 1891); *Laubheim v. De Koninglyke Neder Landsche Stoomboot Maatschappy*, 107 N.Y. 228, 230, 13 N.E. 781 (1887); *DeRoche v. Commodore Cruise Line, Ltd.*, 46 Cal. Rptr. 2d 468, 472 (Cal. Ct. App. 1994).[4] These cases all adopt the principles espoused in *Barbetta* as the applicable law.

In 1959, a federal district court judge in California took exception to the rule, and, ignoring the will of his own

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[4] In *De Zon v. American President Lines*, 318 U.S. 660 (1943), this Court, holding that an employer was liable to *seamen* for negligence of a ship's physician, in a footnote observed that "[l]iability to a *passenger* injured by the negligence of a ship's doctor has been denied on this ground," *id.* at 666 n.2 (emphasis added), and discussed and quoted as "statements of judges of great learning" the early cases establishing the rule of non-liability. Though the court in *Nietes* said it thought this Court in *De Zon* did so "with implied criticism," *Nietes*, 188 F. Supp. at 220, we have carefully read *De Zon* and can find no such implication.

judicial superiors on the Ninth Circuit Court of Appeals,[5] and relying not on ship cases but on hospital and corporation cases, made his own rule:

> It is our opinion that, where a ship's physician is in the regular employment of a ship, as a salaried member of the crew, subject to the ship's discipline and the master's orders, and presumably also under the general direction and supervision of the company's chief surgeon through modern means of communication, he is, for the purposes of respondeat superior at least, in the nature of an employee or servant for whose negligent treatment of a passenger a shipowner may be held liable.

Nietes v. American President Lines, Ltd., 188 F. Supp. 219, 220 (N.D. Cal. 1959). Despite a lapse of 44 years, no court until Florida's Third District Court of Appeal in this case followed *Nietes* to hold a shipowner vicariously liable. As Judge Marcus vividly put it in *Fairley v. Royal Cruise Line Ltd.*, 1993 A.M.C. 1633 (S.D. Fla. 1993), "the overwhelming tide of case law on the question holds that a shipowner may not be held vicariously liable for the torts of the ship's doctor," and "[t]he lone beacon of dissent is *Nietes*. . . . " *Id.* at 1634, 1635. Apart from not being followed, *Nietes* has been criticized by several courts. *See DeRoche*, 46 Cal. Rptr. 2d at 472 ("*Nietes* . . . appears to stand alone . . . and has been criticized roundly for it"). *Accord Malmed*, 1995 WL 505915, at *1 n.2. In *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. at 1042, the court observed that the *Nietes* rationale, "while perhaps viable for the specific fact

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[5] *The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918); *The Great Northern*, 251 F. 826, 831-32 (9th Cir. 1918).

pattern in *Nietes*, is not sound as a general rule," *accord Di Bonaventure*, 536 F. Supp. at 103, and that "[t]o pretend, as the *Nietes* case does, that mere employment of a physician by a shipping company . . . creates control, is to create a species of liability without fault which is without precedent." *Amdur*, 310 F. Supp. at 1042-43. The *Barbetta* court found *Nietes* to be "internally contradictory" and misguided. 848 F.2d at 1370-71.

Again, the Third District here embraced the never-before-followed *Nietes* case that would hold shipowners liable for shipboard doctors' negligence, "reject[ed] the holding of the *Barbetta* line of cases," and "impos[ed] . . . vicarious liability" on Carnival. 864 So. 2d at 5, 7 (App. B at 27a, 33a). Although the district court acknowledged that it was required to apply maritime law, 864 So. 2d at 3 (App. B at 23a), it chose a lone case and general principles over a huge majority of contrary decisions and the rule precisely on point. On Carnival's motion, the Third District certified to the Florida Supreme Court the question "whether a cruise line is vicariously liable for the medical malpractice of the shipboard doctor, committed on a ship's passenger." 864 So. 2d at 8.

In February 2007, the Florida Supreme Court quashed the Third District's decision and answered the certified question in the negative, correctly recognizing that, at the time this case was decided by the Third District, "with the exception of *Nietes*, the federal maritime law uniformly held that a ship owner is not vicariously liable for the medical negligence of the shipboard

physician." 953 So. 2d at 470-71 (App. A at 18a-19a).[6] Applying well-established precedent from this Court that state courts must adhere to federal principles of uniformity when applying federal maritime law, the Florida Supreme Court held that the Third District was bound to follow the uniform maritime precedent articulated in *Barbetta* and was not free to deviate from it. 953 So. 2d at 465, 470 (App. A at 7a-8a, 18a).[7]

Other than the now-reversed decision by the Third District here, the only other decisions following *Nietes* to impose vicarious liability on shipowners are two lower court decisions ignoring federal precedent. Before the Florida Supreme Court issued its opinion here, a senior judge of the United States District Court for the Southern District of Florida, relying on the Third District's erroneous decision on vicarious liability in this case, and also allowing that the cruise line could be liable under a theory

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[6] Carlisle had sought to hold Carnival liable on theories of, among other things, vicarious liability, negligent hiring and apparent agency. 864 So. 2d at 2 (App. B at 21a). As a result of its decision on vicarious liability, the Third District did not reach any issues of apparent agency, and it expressly found no error in that portion of the summary judgment on the claim of negligent hiring. 864 So. 2d at 8 n.5 (App. B at 35a-36a n.5). The Florida Supreme Court in this case did not address these alternative issues. Carlisle recently asked the Third District to adjudicate the apparent agency issue once this Court has ruled on her petition for writ of certiorari. After the Florida Supreme Court issued its mandate and remanded the case to the Third District on April 12, 2007, Carlisle successfully moved to stay the proceedings in the Third District pending this Court's review of the Florida Supreme Court's decision. Should this Court deny or grant review, Florida's Third District will revisit the issue of apparent agency on remand.

[7] Carlisle's assertion that "the Florida Supreme Court [in this case] *expressly* stated that it *agreed* with the reasoning of *Nietes*" is inaccurate and misleading (Petition at 5) (emphasis added).

of apparent agency, denied a motion to dismiss a complaint against Carnival for the alleged negligence of the shipboard doctor in treating a passenger. *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372, 1374-75 (S.D. Fla. 2004). In doing so, the district court judge ill-advisedly rejected the precedent of federal circuit courts and his *own court* to rely on a state court decision that completely departed from the established federal maritime law it was bound to follow. While it is true that the Eleventh Circuit has not addressed this issue, *id.* at 1374 n.5, that did not stop the Southern District in six earlier decisions and four later decisions, from adhering – as it knew it should in the interest of maintaining uniformity – to the *Barbetta* rule.[5] Moreover, to the extent *Huntley* was based on the Third District's erroneous decision in *Carlisle, Huntley* is also wrong, and its precedential value is negligible at best. *See also Doonan,* 404 F. Supp. 2d at 1371 (in dismissing with prejudice plaintiffs' claim of vicarious liability against Carnival for negligence of shipboard physician, declining to follow *Carlisle* or *Huntley* decisions, "which are non-binding authority").

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[5] *See Barnett v. Carnival Corp.*, No. 06-22521-CIV, 2007 WL 1746900, at **3-4 (S.D. Fla. June 15, 2007); *Barnett v. Carnival Corp.*, No. 06-22521-CIV, 2007 WL 1526658, at **3-4 (S.D. Fla. May 23, 2007); *Walsh v. NCL (Bahamas) Ltd.*, 466 F. Supp. 2d 1271, 1273-74 (S.D. Fla. 2006); *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1370-71 (S.D. Fla. 2005); *Jackson v. Carnival Cruise Lines, Inc.*, 203 F. Supp. 2d 1367, 1374 (S.D. Fla. 2002); *Doe v. Celebrity Cruises*, 145 F. Supp. 2d 1337, 1345-46 (S.D. Fla. 2001); *Warren v. Ajax Navigation Corp.*, No. 91-0230-CIV-RYSKAMP, 1995 WL 688421, at *3 (S.D. Fla. Feb. 3, 1995) (unpublished); *Fairley v. Royal Cruise Line Ltd.*, 1993 A.M.C. 1633, 1634-35, 1639 (S.D. Fla. 1993); *Nanz v. Costa Cruises, Inc.*, 1991 A.M.C. 48, 49 (S.D. Fla. 1990), *affirmed*, 932 F.2d 977 (11th Cir. 1991); *Mascolo v. Costa Crociere, S.p.A.*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989).

Also before the Florida Supreme Court's decision in *Carlisle*, an Illinois intermediate appellate court relied on *Nietes* in upholding the reinstatement of a vicarious liability claim against Royal Caribbean for the alleged negligence of a shipboard doctor. *Mack v. Royal Caribbean Cruises, Ltd.*, 838 N.E. 2d 80 (Ill. App. Ct. 2005), *appeal denied, Mack v. Royal Caribbean Cruises, Ltd.*, 850 N.E. 2d 808 (Ill. 2006), *cert. denied, Royal Caribbean Cruises, Ltd. v. Mack*, 127 S.Ct. 350 (2006). In that case, fully acknowledging that its decision was a "depart[ure] from the established rule barring [such] vicarious liability claims," 838 N.E. 2d at 89, the state appellate court inconsistently and mistakenly assumed that because "*Nietes* and the federal cases that have followed its reasoning and holding" demonstrate that the issue of whether a shipowner may be held vicariously liable for the on-board doctor's medical negligence "is not settled at this time," it was free to follow *Nietes*. *Id.* The assumption was wrong because the "issue" *is* settled maritime law, and consequently the state court had no right to address this issue at all.

Additionally, the *Mack* court relied extensively on the flawed reasoning in the now-reversed *Carlisle* decision and the atypical decisions of *Nietes* and *Huntley*. 838 N.E. 2d at 89-91.[9] The intermediate appellate court also cited to the

[9] The Illinois state court also surprisingly cited to *Fairley v. Royal Cruise Line, Ltd.*, 1993 A.M.C. 1633 (S.D. Fla. 1993), in support of its decision. *Mack*, 838 N.E. 2d at 88, 91. Although the *Fairley* court expressed its displeasure with the reasoning of *Barbetta*, it actually held that the court was *bound by* the *Barbetta* rule on vicarious liability. 1993 A.M.C. at 1638-39. There the plaintiff had alleged apparent agency and joint venture theories arising out of the alleged malpractice of the ship's doctor, and the cruise line moved to dismiss. The district court, acknowledging that "the majority rule precludes

(Continued on following page)

criticism of the *Barbetta* rule by some legal scholars.[10] While a few scholars have sung *Nietes'* praises and criticized the *Barbetta* rule, courts are bound by controlling decisions notwithstanding scholarly criticism. *American Trucking Ass'ns, Inc. v. Larson*, 683 F.2d 787, 790 (3d Cir. 1982) ("we are not free to exercise the same license as scholars in disregarding still binding precedent"); *Cargill, Inc. v. Offshore Logistics, Inc.*, 615 F.2d 212, 215 (5th Cir. 1980) ("[t]he Appellant . . . cites us to many scholarly criticisms . . . , but we are bound by the former decisions of this court"); *Rader v. Johnston*, 924 F. Supp. 1540, 1549 n.19 (D. Neb. 1996) ("[a]lthough the majority opinion in *Smith* has been harshly criticized by virtually every legal scholar and commentator addressing the decision . . . there is no question that the *Smith* decision is valid, binding precedent at this time").

Most tellingly, last term, this Court declined to review the Illinois state appellate court's decision in *Mack* where

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suing the shipowner based on the theory of respondeat superior," *Fairley*, 1993 A.M.C. at 1639, denied the motion to dismiss because it was unable to say that "there [was] no conceivable set of facts under which the Plaintiff could prevail on . . . for example, an agency-by-estoppel theory." *Id.* The *Fairley* court knew it must follow the *Barbetta* rule, and simply held that the plaintiff *might* be able to pursue another avenue to recovery.

[10] *Mack*, 838 N.E. 2d at 88-89, citing Thomas A. Dickerson, *The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights*, 28 Tul. Mar. L.J. 447 (2004); Beth-Ann Erlic Herschaft, *Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer by the Star of Stare Decisis?*, 17 Nova L. Rev. 575 (1992); Michael J. Compagno, *Malpractice on the Love Boat: Barbetta v. S/S Bermuda Star*, 14 Tul. Mar. L.J. 381 (1990); Thomas A. Gionis, *Paradox on the High Seas: Evasive Standards of Medical Care - Duty Without Standards of Care; a Call for the International Regulation of Maritime Healthcare Aboard Ships*, 34 J. Marshall L. Rev. 751 (2001).

the petitioner raised nearly the identical theory of conflict urged by Carlisle in this case. *Royal Caribbean Cruises, Ltd. v. Mack,* 127 S.Ct. 350 (2006). In the petition for writ of certiorari filed in this Court, Royal Caribbean argued that the state court's decision to impose vicarious liability on the cruise line for the negligence of the shipboard physician conflicted with precedent from this Court and "a century's worth of decisions of federal circuit courts of appeal." *Royal Caribbean Cruises, Ltd. v. Mack,* No. 05-1662, 2006 WL 1786665, at *6 (U.S. June 27, 2006) (Petition for Writ of Certiorari). Notwithstanding this claim of "conflict" (albeit by the defendant in that case and in a different legal posture than here), this Court denied certiorari review. *Royal Caribbean Cruises*, 127 S.Ct. 350. And apart from the Florida Supreme Court's recent decision to quash the Third District's aberrant *Carlisle* opinion, no significant legal developments have occurred after this Court denied the petition for writ of certiorari in *Mack* that would warrant a different decision here. There was no conflict then, and there is no conflict now. Accordingly, this Court should similarly decline to review the Florida Supreme Court's decision in this case.

In any event, three lower-court cases do not a "split of authority" make. Here at least thirty-two decisions, including five federal circuit court decisions, have adhered to the *Barbetta* rule, and only two federal district court decisions and a single intermediate state appellate court have rejected it in approximately one hundred and twenty years.

> For there to be a "split of authority," . . . the rule urged . . . must have been pronounced either by the highest court of a state or by a federal circuit court. Neither state intermediate courts of appeals cases nor federal district court cases are

> sufficiently authoritative to constitute a "split of authority" unless there are so many of them from one jurisdiction over such a long period that it can be reasonably inferred that the highest court of the state or the federal court of appeals acquiesces in the rule.

Blankenship v. General Motors Corp., 406 S.E.2d 781, 786 n.9 (W. Va. 1991).

Because Carlisle has failed to establish that the Florida Supreme Court's decision in this case conflicts with any decision of this Court or another court of appeals, the Court should deny the petition.

II. The Florida Supreme Court Did Not Decide an Important Issue of Federal Maritime Law

For the same reasons that it cannot be said that a conflict exists between the decision of the Florida Supreme Court here and any other appellate decision, it cannot be said that the Florida Supreme Court in this case "decided" an important question of federal maritime law. Sup. Ct. R. 10(b), (c). The Florida Supreme Court did not address the merits on the question of a shipowner's vicarious liability; instead, it merely decided – squarely in accord with precedent of this Court[11] – that the Third District had no authority to depart from uniform maritime precedent by changing a firmly established maritime rule. Thus, it could hardly be said that this decision implicates an

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[11] *See, e.g., American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986); *Madruga v. Superior Court*, 346 U.S. 556, 561 (1954); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924).

important issue of federal law that is unsettled by this Court.

And, as the cases cited in point I.B make clear, the federal and state appellate and district courts have – for more than a century – adhered to the settled maritime rule of *Barbetta*. Thus, even if it could be said that the Florida Supreme Court inferentially reached the substantive issue by answering the certified question in the negative, the decision to apply firmly entrenched maritime jurisprudence that a shipowner is not vicariously liable for the negligence of the shipboard doctor in treating passengers was made many years ago – in other cases.

III. The Florida Supreme Court Reached the Right Decision, and the *Barbetta* Rule Is Correct

Finally, the Florida Supreme Court reached the right decision below because the Third District had no right to deviate from the settled *Barbetta* rule on the vicarious liability of a shipowner for the shipboard doctor's negligence, and the *Barbetta* rule is correct.

As we have said, the Florida Supreme Court, consistent with well-settled precedent of this Court, correctly held that the Third District could not interfere with the uniformity of maritime law by altering a well-settled maritime rule. *Carlisle,* 953 So. 2d at 465, 470 (App. A at 7a-8a, 18a). *See also American Dredging,* 510 U.S. at 447 (state court may "'adopt such remedies, and . . . attach to them such incidents, as it sees fit' *so long as it does not attempt to make changes in the 'substantive maritime law'*") (emphasis added), quoting *Madruga,* 346 U.S. at 561, quoting *Red Cross Line,* 264 U.S. at 124. *Accord Offshore Logistics,* 477 U.S. at 222. Consequently, because

the Third District violated the prohibition against a state's changing substantive maritime law by rejecting the established *Barbetta* rule in favor of the never-before-followed *Nietes*, the Florida Supreme Court quashed the Third District's decision. 953 So. 2d at 465, 470-71 (App. A at 7a-8a, 18a-19a). The Florida Supreme Court's decision is entirely correct.

In addition, Carlisle's argument that this Court should overrule the *Barbetta* rule because it has "outlived its usefulness" is entirely unconvincing (Petition at 8, 15). Carlisle points to this Court's decisions in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), and *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), as support for her theory that this Court can overrule maritime precedent where it is outdated (Petition at 8-10). But neither of those decisions is helpful to Carlisle because the Court's rationales for changing maritime jurisprudence in those cases have no application here.

In *Moragne*, this Court overruled *The Harrisburg*, 119 U.S. 199 (1886), which had held that general maritime law offered no wrongful death remedy for tortious deaths occurring on state territorial waters. 398 U.S. at 375-76, 401, 409. For almost a century pre-dating *Moragne*, there was an adequate federal remedy for fatal accidents on the high seas, but the same accidents nearer shore might yield more generous awards – or none at all – depending on the law of the nearest state. These resulting anomalies in wrongful death recoveries prompted this Court to establish a maritime wrongful death action consistent with the "constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Moragne*, 398 U.S. at 401-02 (citations and internal quotation marks

omitted). Consequently, this Court held that an action existed for wrongful death in territorial waters "caused by [the] violation of maritime duties." 398 U.S. at 409. By aligning the general maritime law with the policies embodied in the Death on the High Seas Act and the Jones Act and state statutory schemes, this Court furthered the twin aims of maritime law, uniformity and special solicitude – "[o]ur recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." 398 U.S. at 401.

Similarly, in *Reliable Transfer,* the Court overruled the unquestionably archaic divided-damages rule, set forth in *The Catharine,* 58 U.S. 170 (1854), under which damages were divided equally among concurrent maritime tortfeasors without any attempt to determine the parties' proportional fault. 421 U.S. at 397-98, 410-11. Stating that this rule "has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit," this Court noted that the rule had been "repeatedly criticized by experienced federal judges who have correctly pointed out that the result it works has too often been precisely the opposite of what the Court [has] sought to achieve . . . – the 'just and equitable' allocation of damages." 421 U.S. at 410-11. Recognizing that this goal could be more nearly realized by a standard that allocated liability for damages according to comparative fault whenever possible, this Court established the rule of proportional fault for admiralty collision cases. 421 U.S. at 411.

Thus, this Court has modified established maritime precedent where it served to promote the aims of maritime

law. This Court in *Moragne* created a wrongful death remedy under general maritime law in an effort to achieve uniformity in maritime law and correct the then-existing anomalies in wrongful death maritime recovery schemes, while in *Reliable Transfer,* it sought to modify an undeniably outdated and inequitable rule that had been repeatedly critiqued by federal judges. Here, by contrast, the *Barbetta* rule is fully consistent with maintaining the uniformity of maritime jurisprudence and has been routinely commended and followed by federal judges for over a century. Unlike in *Moragne* and *Reliable Transfer,* there is no compelling need to alter this well-settled maritime rule.

Carlisle further claims that *Barbetta* is "based on flawed and outmoded assumptions regarding the modern day cruise ship industry and the provision of shipboard medical services to passengers" (Petition at 8), specifically that "passengers are free to contract with the ship's doctor for any medical services they may require" (Petition at 11) and that "the ship's physician is provided for the convenience of the ship's passengers" (Petition at 12). But a closer look at *Barbetta* and other cases following the rule shows that although they may recite or quote the "convenience of the ship's passengers" and "free[dom] to contract" language, they are, except for a few very early cases, grounded on the issue of the shipowners' ultimate *control* over the doctor and the doctor-patient relationship. This is the primary and most prominent rationale for adherence to the rule. *See Barbetta*, 848 F.2d at 1369 (two justifications for the rule, both relating to control: (1) "the nature of the relationship between the passenger and the physician, and the carrier's lack of control over that relationship," and (2) a shipping company's lack of "expertise requisite to supervise a physician

or surgeon carried on board a ship") (citations and internal quotation marks omitted); *Malmed v. Cunard Line Ltd.*, No. 91 Civ. 8164 (KMW), 1995 WL 505915, at *2 (S.D.N.Y. Aug. 23, 1995) (unpublished) ("[c]ourts have . . . concluded that although a carrier may control certain aspects of a physician's employment – such as hours, wages, and working conditions – *the carrier does not control precisely that aspect of the physician's performance at issue in a malpractice or negligence action, that is, his or her practice of medicine*") (emphasis added); *Warren v. Ajax Navigation Corp.*, No. 91-0230-CIV-RYSKAMP, 1995 WL 688421, at *3 (S.D. Fla. Feb. 3, 1995) (unpublished) ("[n]umerous courts have found that the carrier or shipowner lacks both (1) the expertise to meaningfully evaluate and, therefore, control a doctor's treatment of his patients and (2) the power, even if it had the knowledge, to intrude into the physician-patient relationship"); *Gillmor v. Caribbean Cruise Line, Ltd.*, 789 F. Supp. 488, 491 (D.P.R. 1992) (quoting *Barbetta* expertise and control language); *Hilliard v. Kloster Cruise, Ltd.*, 1991 A.M.C. 314, 317 (E.D. Va. 1990) (citing *Barbetta* justifications – lack of control and expertise); *Nanz v. Costa Cruises, Inc.*, 1991 A.M.C. 48, 49-50 (S.D. Fla. 1990) ("each court addressing the issue . . . ha[s] focused on two issues: the element of control existing such that the master/servant doctrine does or does not apply; and the relationship between the passenger and the medical personnel and the level of control, if any, the shipowner/operator has over that relationship"), *affirmed*, 932 F.2d 977 (11th Cir. 1991); *Mascolo v. Costa Crociere, S.p.A.*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989) (citing *Barbetta* justifications – lack of control and expertise); *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 103-04 (E.D. Pa. 1982) (ship's doctor is an independent medical expert; "[w]here . . . control is lacking, there can be no vicarious liability"); *Amdur v. Zim Israel*

Navigation Co., 310 F. Supp. 1033, 1042-43 (S.D.N.Y. 1969) (shipping company does not possess expertise requisite to supervise physician and does not occupy a position of control over a ship's physician).[12,13]

Judge Marcus, in *Fairley*, recognized the control justification for the rule:

> The harshness of the [*Barbetta*] rule can only be justified by the notion that *meaningful* control is a prerequisite to vicarious liability and that – under any conceivable set of facts, and *even if he is a regular crewmember* – the carrier has no meaningful ability to control the ship's doctor.

1993 A.M.C. at 1637 (emphasis added).

Whether or not one agrees that a cruise ship's doctor is there for the convenience of passengers, or that passengers are free to decline the services of a ship's doctor, the fact remains – and this is key, because it is the basis of vicarious liability – that a shipowner has neither the control over the doctor-patient relationship nor the expertise to be held vicariously liable for a shipboard doctor's negligence in treating passengers. It is the courts' recognition of this

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[12] The cases we have not listed here follow the rule without discussing rationale.

[13] Of the four early cases discussing passengers' freedom to consult the doctor or not, only *Churchill v. United Fruit Co.*, 294 F. 400, 401-02 (D. Mass. 1923), did not also rely on some aspect of control. *See O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 267 (Mass. 1891) ("[t]he master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger"); *The Great Northern*, 251 F. 826, 831 (9th Cir. 1918) (same); *Allan v. State S.S. Co.*, 30 N.E. 482, 484-85 (N.Y. 1892) (no officer of the ship is competent to supervise the physician in his treatment of passengers; the responsible person is the physician, independent of all superior authority).

principle that has sustained the *Barbetta* rule all these years.

Finally, Carlisle argues that "[t]o the extent that cruise lines benefit economically from providing medical services to passengers, there is no reason why they should not be required to assume responsibility. . . ." (Petition at 14). But shipowners *do* assume responsibility. They cannot hire just *any* doctors, they must hire competent, duly qualified doctors, or they *will* be liable. "If the carrier breaches [this] duty, it is responsible for its own negligence." *Barbetta*, 848 F.2d at 1369.[14,15]

Because a shipowner cannot have the requisite control over a shipboard doctor to impose vicarious liability, the *Barbetta* rule is correct and should remain intact.

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[14] Here, the trial court also entered summary judgment for Carnival on Carlisle's claim of negligent hiring, and the Third District court affirmed that ruling. *Carlisle*, 864 So. 2d at 8 n.5 (App. B at 36a n.5).

[15] Carlisle also says that because Carnival is liable to crew members it should be liable to passengers (Petition at 14). But control is not a factor in liability to crew members, which has historically been based on the special nature of the relationship between a shipowner and crew members and which is guaranteed regardless of fault. *See Barbetta*, 848 F.2d at 1369 n.1, *quoting De Zon v. American President Lines*, 318 U.S. 660, 667 (1943). This comparison, therefore, cannot provide justification for imposing vicarious liability in the case of passengers. And although Carlisle suggests that a plaintiff has no remedy against a ship's doctor (Petition at 15), courts have found personal jurisdiction against ships' physicians in similar cases. *See Benson v. Norwegian Cruise Line Ltd.*, 859 So. 2d 1213, 1215 (Fla. 3d DCA 2003); *Rana v. Flynn*, 823 So. 2d 302, 303 (Fla. 3d DCA 2002); *Rossa v. Sills*, 493 So. 2d 1137, 1138 (Fla. 4th DCA 1986); *Wurtenberger v. Cunard Line Ltd.*, 370 F. Supp. 342, 344-45 (S.D.N.Y. 1974). *See also Pota v. Holtz*, 852 So. 2d 379, 381-82 (Fla. 3d DCA 2003).

CONCLUSION

Carlisle has not established any compelling reasons for this Court to grant the petition for writ of certiorari. Therefore, Carnival respectfully requests that this Court deny the petition.

Respectfully submitted,

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